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Mimos Bhd v BCM Electronics Corp Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-920–05 OF 2019
ABDUL KARIM, GUNALAN MUNIANDY AND DARRYL GOON JJCA
17 MARCH 2022

C *Civil Procedure — Appeal — Appeal against decision of High Court — High Court allowed respondent's claim — Respondent claimed against appellant for sum in respect of product — Whether appellant had instructed respondent to manufacture product based on its email*

D This was an appeal against the decision of the High Court in allowing the respondent's claim against the appellant for a sum of RM1,672,789, together with interest, in respect of certain products allegedly ordered or instructed to be manufactured by the appellant. The parties entered into a new product introduction agreement ('NPIA'). MTR was the acronym given in the NPIA E for MIMOS Technology Recipients, which were third parties licensed by the appellant to have products manufactured, distributed, sold and supported. The NPIA contemplated the respondent manufacturing for the appellant, as well as third parties who were MTRs. Sometime in February and March of 2012, there were exchanges of emails between the parties in relation to the mass F manufacture of a 'product' as defined, namely, an electronic item which was a wireless router, given the name 'WiWi' ('WiWi product'). According to the respondent's pleaded case, based on instructions issued by the appellant to the respondent in an email dated 13 March 2012, the respondent proceeded with 'manufacturing activities of the said products' and the number of units of the G WiWi product required was alleged to be 2,822 units. On 28 June 2012, the appellant discovered a defect in the WiWi product. As a result, the appellant issued a 'stop built stop ship' instruction to the respondent. Following this 'stop built stop ship' instruction, the respondent then became saddled with all the raw materials that it had purchased for the manufacture of the 2,822 units of H the WiWi product. Pursuant to negotiations on 18 November 2013, the appellant issued a letter of acceptance of a proposal by the respondent, for the purchase of certain components from the respondent ie printed circuit board assemblies ('PCBA') where the appellant purchased a total of 1,000 units of PCBAs. However, there were still remaining components acquired by the I respondent for the 2,822 units of the WiWi product allegedly ordered by the appellant. Thus, this claim by the respondent for the expenses incurred and costs of raw materials/component parts, which the respondent had purchased based on instructions allegedly given by the appellant for the manufacture of 2,822 units of the WiWi product. At the trial in the High Court, the learned

judge allowed the respondent's claim and hence this appeal. A

Held, allowing the appeal with costs:

(1) The email from SD2 to SP2 and her colleagues on 9 March 2012 could not possibly be construed to somehow mean that no purchase order ('PO') was required in respect of the manufacture of the WiWi product. The phrase 'regardless of with or without PO by us' meant regardless of whether any orders were made. The email by SD3 to SP1 on 13 March 2012 was a forecast of potential orders by both MTRs and the appellant. That this was not instruction 'to proceed with manufacturing activities of the said products' was plain and obvious in both the specific words used and the circumstances and context within which this email from SD3 was sent. In the table provided, the forecast of the total units of the WiWi product that the appellant would require was only 72. The rest of the forecasted total units of 2,822 of the WiWi product ie the balance 2,750 units, were for MTRs, not the appellant. Having regard to the express words used in the email of 13 March 2012 itself, it was neither rational nor reasonable to conclude that they were tantamount to instructions to manufacture 2,822 units of the WiWi product. The subject of the email itself was headed 'WIWI Order Forecast'. The message in the email itself contained the words 'order/built forecast based on respective TR need for potential development'. The table upon which the number of units of the WiWi product was derived, ie 2,822, was entitled 'WIWI TR' and 'Forecast' (see paras 34, 42, 48 & 68). B C D E

(2) A procurement agreement and purchase orders were issued for the 1,000 units of PCBA. These were not settlement agreements in acknowledgement of a wrong committed. The purchase of the 1,000 units of PCBA was not a purchase of 1,000 units of the WiWi product. It was a purchase of 1,000 units of a component that the appellant could use for its own projects. It was not reasonable to conclude that the purchase was somehow incompatible with a bona fide transaction to secure usable components for the appellant and at the same time to provide some assistance to the respondent in the predicament that it had found itself. It was incorrect for the learned trial judge to conclude that these purchases were payment, 'for a portion of the 'unconfirmed order'. They were purchases and payment for component parts that the appellant could use which explanation, in any event, was not challenged in cross-examination (see paras 57, 59 & 72). F G H

[Bahasa Malaysia summary I

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden terhadap perayu untuk sejumlah RM1,672,789, berserta faedah, berkenaan dengan produk tertentu yang didakwa dipesan atau diarahkan untuk dihasilkan oleh perayu. Pihak-pihak memeterai perjanjian

pengenalan produk baharu ('NPIA'). MTR ialah akronim yang diberikan dalam NPIA untuk Penerima Teknologi MIMOS, yang merupakan pihak ketiga yang dilesenkan oleh perayu untuk mempunyai produk yang dihasilkan, diedarkan, dijual dan dipegang. NPIA menggambarkan penghasilan responden untuk perayu, serta pihak ketiga yang merupakan MTR. Pada bulan Februari dan Mac 2012, terdapat pertukaran emel antara pihak berkaitan dengan penghasilan besar-besaran 'produk' seperti yang ditakrifkan, iaitu, item elektronik yang merupakan penghala tanpa wayar, diberi nama 'WiWi' ('produk WiWi'). Mengikut kes yang diplidkan responden, berdasarkan arahan yang dikeluarkan oleh perayu kepada responden dalam emel bertarikh 13 Mac 2012, responden meneruskan 'aktiviti penghasilan produk tersebut' dan bilangan unit produk WiWi yang diperlukan didakwa adalah 2,822 unit. Pada 28 Jun 2012, perayu mendapati terdapat kecacatan pada produk WiWi. Akibatnya, perayu mengeluarkan arahan 'stop built stop ship' kepada responden. Berikutan arahan 'stop built stop ship' ini, responden kemudiannya dibebani dengan semua bahan mentah yang dibelinya untuk penghasilan 2,822 unit produk WiWi. Mengikut rundingan pada 18 November 2013, perayu mengeluarkan surat penerimaan cadangan oleh responden, untuk pembelian komponen tertentu daripada responden iaitu pemasangan papan litar bercetak ('PCBA') di mana perayu membeli sejumlah 1,000 unit PCBA. Walau bagaimanapun, masih terdapat baki komponen yang diperoleh oleh responden bagi 2,822 unit produk WiWi yang didakwa dipesan oleh perayu. Justeru, tuntutan ini oleh responden untuk perbelanjaan yang ditanggung dan kos bahan mentah/bahagian komponen, yang responden telah beli berdasarkan arahan yang didakwa diberikan oleh perayu untuk mengeluarkan 2,822 unit produk WiWi. Pada perbicaraan di Mahkamah Tinggi, hakim yang bijaksana membenarkan tuntutan responden dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Emel daripada SD2 kepada SP2 dan rakan-rakannya pada 9 Mac 2012 tidak mungkin boleh ditafsirkan dengan bermakna bahawa tiada pesanan pembelian ('PO') diperlukan berhubung dengan pembuatan produk WiWi. Ungkapan 'regardless of with or without PO by us' bermaksud tidak kira sama ada sebarang pesanan telah dibuat. Emel oleh SD3 kepada SP1 pada 13 Mac 2012 adalah ramalan potensi pesanan oleh kedua-dua MTR dan perayu. Bahawa ini bukan arahan 'to proceed with manufacturing activities of the said products' adalah jelas dan nyata dalam kedua-dua perkataan khusus yang digunakan serta keadaan dan konteks di mana emel daripada SD3 ini dihantar. Dalam jadual yang disediakan, ramalan jumlah unit produk WiWi yang diperlukan oleh perayu hanyalah 72. Selebihnya daripada jumlah unit yang diramalkan sebanyak 2,822 daripada produk WiWi iaitu baki 2,750 unit, adalah untuk MTR, bukan perayu. Mengambil kira perkataan nyata yang digunakan dalam emel 13 Mac 2012 itu sendiri, adalah tidak rasional

dan tidak munasabah untuk membuat kesimpulan bahawa ia adalah sama dengan arahan untuk mengeluarkan 2,822 unit produk WiWi. Subjek emel itu sendiri bertajuk 'WIWI Order Forecast'. Mesej dalam emel itu sendiri mengandungi perkataan 'order/built forecast based on respective TR need for potential development.' Jadual di mana bilangan unit produk WiWi diperoleh, iaitu 2,822, bertajuk 'WIWI TR' dan 'Forecast' (lihat perenggan 34, 42, 48 & 68).

(2) Perjanjian perolehan dan pesanan pembelian telah dikeluarkan untuk 1,000 unit PCBA. Ini bukan perjanjian penyelesaian sebagai mengakui kesalahan yang dilakukan. Pembelian 1,000 unit PCBA bukanlah pembelian 1,000 unit produk WiWi. Ia adalah pembelian 1,000 unit komponen yang boleh digunakan oleh perayu untuk projeknya sendiri. Adalah tidak munasabah untuk membuat kesimpulan bahawa pembelian itu adalah tidak sesuai dengan urus niaga bona fide untuk mendapatkan komponen yang boleh digunakan untuk perayu dan pada masa yang sama untuk memberikan sedikit bantuan kepada responden dalam kesusahan yang ia alami sendiri. Adalah tidak betul bagi hakim bicara yang bijaksana untuk membuat kesimpulan bahawa pembelian ini adalah bayaran, 'untuk sebahagian daripada pesanan yang tidak disahkan'. Ia adalah pembelian dan pembayaran untuk bahagian komponen yang boleh digunakan oleh perayu yang mana penjelasan, dalam apa jua keadaan, tidak dicabar dalam pemeriksaan balas (lihat perenggan 57, 59 & 72).]

Cases referred to

Assicurazioni Generali SpA v Arab Insurance Group; Practice Note [2003] 1 WLR 577, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

The Glannibanta (1876) LR 1 PD 283, CA (refd)

UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

Appeal from: Civil Suit No WA-22NCVC-167–03 of 2016 (High Court, Kuala Lumpur)

Shamala Devi Balasundaram (with Calvin Wong Wai Hou) (Chooi & Co + Cheang & Ariff) for the appellant.

Shamesh a/l Jeevaretnam (with Charlotte Williams) (Jeeva Partnership) for the respondent.

Darryl Goon JCA:

[1] This case concerns a claim by the appellant against the respondent that turned, primarily, on a question of fact as to whether an order was placed by the appellant with the respondent, for certain units of a product to be manufactured.

[2] The appellant, Mimos Bhd, was the defendant in this case. It is a government linked company involved in research and development in the field of information and communication technology, industrial electronics technology and nano-semiconductor technology.

[3] The respondent, BCM Electronics Corp Sdn Bhd, was the plaintiff. It is a contract manufacturer operating particularly in the field of electronics and is in the business of manufacturing and assembling electronic components based on designs and specifications provided by its customers. The respondent was chosen as the designated manufacturer of products created based on the appellant's technologies.

[4] This appeal was against the decision of the High Court in allowing the respondent's claim against the appellant for a sum of RM1,672,789, together with interest, in respect of certain products allegedly ordered or instructed to be manufactured by the appellant.

[5] My learned brothers Abdul Karim bin Abdul Jalil and Gunalan a/l Muniandy JJCA have each had the opportunity to read this judgment in draft and have both expressed their concurrence with it.

THE MATERIAL FACTS AND THE DISPUTE

[6] On 28 March 2011, the parties entered into what was described as a New Product Introduction Agreement ('NPIA'). Clause 2 of the NPIA sets out its scope. Broadly, its scope relevant to this case is reproduced below:

> 2. SCOPE OF AGREEMENT
>
> 2.1 Subject to the Terms of this Agreement:
>
> 2.1.1. BCM shall provide the services as stated in this Agreement and shall deliver the Deliverables in accordance with the Timeline; and
>
> 2.2.2 MIMOS shall make payment to BCM for the services rendered and the Deliverables delivered.
>
> 2.2 *BCM shall provide the following services to MIMOS on all work done pursuant to this Agreement*:
>
> 2.2.1 *As and when instructed, BCM shall manufacture Prototypes (or Pilots, as the*

case may be) of the Product based on the MIMOS Technology

2.2.2 Prior to manufacturing the Prototype, BCM shall study the MIMOS Technology and recommend to MIMOS:

(a) ...

2.2.3 *BCM shall manufacture the Product for the MTR upon terms and conditions provided herein*. (Emphasis added.)

Under the NPIA, 'BCM' refers to the respondent. MTR was the acronym given in the NPIA for MIMOS Technology Recipients, which are third parties licensed by the appellant to have products manufactured, distributed, sold and supported. Thus, the NPIA contemplates the respondent manufacturing for the appellant, as well as third parties who are MTRs.

[7] The NPIA may be regarded as an umbrella agreement under which the relationship of the parties was to be regulated every time the respondent's services were called upon. The services to be provided by the respondent under cl 2 included the manufacture of 'prototypes', 'pilots' and 'products' which are defined in the NPIA as:

(a) 'pilot':

shall mean the pre-production runs on the intended production lines. A pilot is used to qualify a product manufacturing processes and to confirm that a product shall conform to the specifications.

(b) prototype:

shall mean the pre-pilot runs of a product in order to validate product design and to confirm that products shall conform to the specifications.

(c) product:

shall mean those products manufactured based on the MIMOS Technology.

[8] For completeness, there was also a subsequent agreement described as Supplement to New Product Introduction Agreement. The parties to this agreement were stated to be the appellant and the respondent but it is undated and unsigned by the respondent. This agreement, however, plays no material role in this case.

[9] Sometime in February and March of 2012, there were exchanges of emails between the parties in relation to the mass manufacture of a 'product' as defined, namely, an electronic item which was a wireless router, given the name 'WiWi' ('WiWi product'). In the emails were discussions and proposals made. One of the issues that vexed the parties was the fact that in order to manufacture the WiWi product there was a 'lead time' required by the

respondent to secure the raw materials for their manufacture. This lead time that was required was among the main issues that the discussions centered on.

[10] According to the respondent's pleaded case, based on instructions issued by the appellant to the respondent in an email dated 13 March 2012, the respondent proceeded with 'manufacturing activities of the said products' and the number of units of the WiWi product required was alleged to be 2,822 units. The respondent pleaded that it had, by an email dated 22 March 2012, confirmed that 'it (respondent) would issue its purchase orders to their suppliers for the purchase of the raw material required.'

[11] The respondent also made reference to an email from the appellant dated 9 March 2012 where, according to the respondent and having regard to the email of 13 March 2012, it was clear and unequivocal that instructions were given to the respondent to proceed to procure the raw materials and to manufacture the WiWi product.

[12] The appellant however contended to the contrary. As far as it was concerned, no orders were placed for 2,822 units of the WiWi product. The 2,822 units of the WiWi product were merely a forecast provided by the appellant at the respondent's request, of orders that may be made in forthcoming months. This was to enable the respondent to address the lead time required to secure the raw materials necessary for the manufacture of the WiWi product. This forecast was for units of the WiWi product not only for the appellant, but also for MTRs. It was also a forecast of the WiWi product and not prototypes. Under the NPIA, the appellant would only be concerned with prototypes not products, as defined.

[13] Based on the respondent's alleged understanding of the aforementioned emails, it proceeded to order raw materials for the purposes of manufacturing 2,822 units of the WiWi product.

[14] On 28 June 2012, the appellant discovered a defect in the WiWi product. Obviously, this was not in respect of any of the 2,822 units in question as these had not been manufactured. As a result, the appellant issued a 'stop built stop ship' instruction to the respondent. The parties were *ad idem* that the issue was with a particular component in the WiWi product. It was a chip. The problem appeared to be that the manufacturer and supplier of that component had misrepresented its capabilities. There was no fault on the respondent's part.

[15] Following this 'stop built stop ship' instruction, the respondent then became saddled with all the raw materials that it had purchased for the manufacture of the 2,822 units of the WiWi product.

[16] Sometime in March of 2013, the parties conducted a joint stock count at the respondent's premises to determine the amount of stock that the respondent had purchased. Pursuant to this joint stock count it was determined that the respondent was in possession of a stock of raw materials to the value of RM3,247,601.58.

[17] Pursuant to negotiations on 18 November 2013, the appellant issued a letter of acceptance of a proposal by the respondent, for the purchase of certain components from the respondent. These components were printed circuit board assemblies ('PCBA'). Following this letter of acceptance was a written procurement agreement entered into between the parties on 2 June 2014 and a purchase order (PO No 5400000714). Pursuant to this purchase order, the appellant purchased 620 units of PCBAs from the respondent for a total price of RM1,200,534.39.

[18] On the 19 December 2013, the appellant issued another letter of acceptance to another proposal by the respondent for the purchase of another 380 units of PCBAs. This was followed by another purchase order, PO No 5400000717. The total consideration paid for this purchase was RM395,089.10.

[19] With the purchase of a total 1,000 units of PCBAs by the appellant, there were still remaining components acquired by the respondent for the 2,822 units of the WiWi product allegedly ordered by the appellant. These remnant components purchased by the respondent, together with handling charges, totalled an amount of RM1,672,789. This then was the amount claimed by the respondent from the appellant in this action.

[20] In short, the respondent's claim was for the expenses incurred and costs of raw materials/component parts, which the respondent had purchased based on instructions allegedly given by the appellant for the manufacture of 2,822 units of the WiWi product.

[21] The foregoing were the basic background facts and the respective position of the parties.

[22] At the trial in the High Court, the learned judge had identified the issues to be determined to be the following which were set out in the learned judge's grounds of judgment:

(a) whether the 2,822 units of WiWi products as notified by the defendant to the plaintiff via the 2nd impugned email (the email dated 13 March 2012) to be construed as a purchase order or merely a forecast of potential orders from the TRs;

A (b) whether the purchase of the raw materials worth RM2,800,000 to manufacture 2,822 units of the WiWi products by the plaintiff was as a result of the plaintiff's own volition or upon the instructions made by the defendant; and

B (c) whether the defendant is liable to the plaintiff for the sum of RM1,672,789 as claimed by the plaintiff.

[23] In regard to these identified issues to be tried, the learned trial judge concluded as follows:

C (a) the 2,822 units of WiWi products as notified by the defendant to the plaintiff via the 2nd impugned email (the email dated 13 March 2012) and other related contemporaneous documents are to be construed as confirmed purchase order and not merely a forecast of potential orders from the TRs;

D (b) the purchase of the raw materials worth RM2,800,000 to manufacture 2,822 units of the WiWi products by the plaintiff was as a result of the instructions made by the defendant not out of the plaintiff's own volition;

E (c) I also accept PW2's evidence that the plaintiff could not dispose of the stock as the plaintiff was unable to utilise the components in its daily manufacturing activities. It is therefore impossible for the plaintiff to mitigate its losses under the circumstances.

[24] In coming to these conclusions, the learned trial judge did not accept F that the appellant's purchase of the 1,000 PCBAs was out of goodwill and not an indication of liability. In the learned judge's words:

> 33 The defendant's contention is that the joint stock count was only out of goodwill and the agreement to purchase 1,000 PCBA could not in any way be construed as an admission of liability. With respect, I find trouble in accepting this line of G argument. I do not think a GLC such as the defendant, would pay another company to the tune of RM1,595,623.49 out of sheer goodwill.
>
> 34 If it was the position of the defendant all along that there was no consensus ad idem between the parties, the defendant would not have paid the aforesaid sum to the plaintiff. The procurement agreement is what it is. It is not, with respect, a H settlement agreement to discharge the parties, in particular the defendant of its respective obligations.
>
> 35 Learned counsel for the plaintiff submitted that the defendant cannot approbate and reprobate. It cannot say that in the absence of any PO, there was the order was never confirmed but later on paid for a portion of the 'unconfirmed order'. I find I merit in this argument.

[25] From the learned judge's grounds of judgment, and the analysis provided therein, the conclusion of the learned judge was derived

predominantly, if not entirely, from a view inferred from the appellant's purchase of the 1,000 PCBAs from the respondent. A

[26] As can be seen from the judgment of the learned trial judge, the case turned entirely on issues of fact and in particular, whether the appellant had ordered or given the respondent instructions to manufacture 2,822 units of the WiWi product. B

The email correspondence

[27] In our view, it is necessary to follow the chain of emails in order to fully appreciate their context and the prevailing issues at the material time. The emails between the parties from 21 February 2012 pointed to concerns about the lead time required to order and secure the raw materials necessary for the manufacture and delivery of the WiWi product. C D

[28] This led to an email dated 1 March 2012 at 3:11pm from SP2 (Noorliza Ab Halim) the programme manager of the respondent, to officers of the appellant. The subject was: 'RE: MIMOS 300, 300, 400 pcs *material buffer strategy*'. (Emphasis added). In this email SP2 stated as follows: E

> Saedah,
>
> Attached pls. find the proposal. Pls. review and feedback for any comment. It is quite complex ... I hope I have done it right to show you the simplest form ...

The proposal attached related to 'material readiness'. It sets out two scenarios. One is where the respondent buys parts in readiness for orders to be made and if no orders are made after three months, the appellant would purchase the parts from the respondents. The other, which was the alternative, was for 'Mimos to consign material' ie to secure the raw materials on a consignment basis. It is significant that below this proposal was a note to the following effect: F G

> Note:
>
> *Order assumption* once a month basis
>
> Max qty 300 pcs per month *forecast*
>
> (Emphasis added.)

H

Thus, the proposal was premised on an assumption that there would be one order a month and a forecast of a maximum of 300 units per month.

[29] On 1 March 2012 at 3:15pm, the appellant's officer SD2 (Jauhari bin Abdul Ghafar), at the material time a director under the Industrial Electronics Technology Division of the appellant, replied SP2's email stating: I

> Liza,
>
> We have component that taking 5 & 4 months LT? I though the most is 3 months.

[30] SP2 replied on the same day, 1 March 2012, at 4:35pm stating:

> Jauhari,
>
> We are using standard LT on paper, most of the time when we issue suppliers a PO we can push it to lower. *Since we are not in that mode yet, I will need to use the standard LT. For our exercise, it is best that we go for the worst case*, I believe. (Emphasis added.)

So far, it is clear that the parties were working on a proposal based on a forecast to estimate the lead time ('LT') required with reference to the time it would take for the supply of raw materials to the respondent in order to manufacture and deliver the WiWi product. This email also made it clear that the respondent was not 'in that mode yet' ie when a PO is issued, whereupon the respondent may then push for an earlier supply date. Thus, for the purposes of the proposal, the standard lead time is used as a worst-case scenario, so stated in the email.

[31] On 2 March 2012 at 4:45pm, SP2 emailed the appellant a revised proposal in an attachment described as 'Mimos WiWi 1.8b *Buffer Strategy*. (Emphasis added.) The subject matter was stated as 'Re MIMOS 300, 300, 400 pcs material buffer strategy'. In this email SP2 stated:

> Jauhari, Saedah,
>
> Attached is the revised file based on our concall just now. Pls. note notation on the LT; above 5 months was previously grouped into 5 months as we have confidence this could be achieved. I have included this now just to make it transparent and be on the safe side, sorry I should have mentioned this earlier. The liability fluctuation remains unchanged.

[32] On 8 March 2012, at 8:03pm, SD2 sent to SP2 and other officers of the respondent an email stating:

> Liza
>
> We have a discussion within MIMOS and would *like you to adjust your proposal* as per attachment. Very similar to yours; just that *we want to assume every month we have 300 sets of material ready* for the build & delivery (until 6 times).
>
> Rational (*estimation only*):
>
> 1 *In the event we want to ensure continuity of supply*, we have to buy/add materials per A2 after each PO month; (*by assumption* PO is ready one month before delivery)
>
> 2 *If no PO at all, exposure is A1 only.*
>
> We need to have this by end of your business day Friday.
>
> p/s: Do not consider your 3 months terms and conditions for this exercise;
>
> *assume* they are all paid by MIMOS.
>
> Regards

Jauhari

(Emphasis added.)

Along the same lines, the parties were clearly still working on the respondent's proposal based on certain assumptions. The reference to 'PO' would indicate that the need for a purchase order was clearly within the contemplation of the parties.

[33] On 9 March 2012, at 8:34am, SP2 emails SD2 and his colleagues stating:

Salam Jauhari,

Pls. clarify when you said assume all paid by Mimos, *is this because your assumption based on the fact that BCM only purchase material once your PO is available* and so we will definitely ship to you. You are not considering the 'consignment material mode, correct'.

Another thing, I can't commit that I can have it done by end of today though we will try, can I submit you on Monday?

Azlina,

Pls. help work out the values based on Jauhari's proposal outlined in the excel sheet.

Regards,

Liza

Program Management

[34] It was in this context that in reply, SD2 stated in his email to SP2 and her colleagues on 9 March 2012 at 9:39am stating as follows:

Liza,

1 *Regardless of with or without PO by us, please do your best by considering that BCM buys the materials. A2 kicks off once PO for 300 units is available. We are interest to know the exposure. Yes, no consignment by us.*

2 OK, Monday will do.

Regards,

Jauhari Abdul Ghafar

Mimos Bhd

This was the email that the learned trial judge referred to as 'the 1st impugned email'. It seems clear from the context of the email trail that this email was a request that the respondent's proposal be based on the respondent buying the materials — 'no consignment by us'. This was the first of the two scenarios provided by the programme manager of the respondent in her email of 1 March 2012 at 3:11pm to the appellant. This was still at the stage where the appellant was considering the respondent's proposal. The appellant was merely making

clear the parameters in order to assess or 'know' their exposure, as stated in the email. This is because the first scenario proposed by the respondent was that the respondent was to purchase the raw materials and, if no orders were made after three months, the appellant would purchase the parts from the respondent. With respect, this email cannot possibly be construed to somehow mean that no PO is required in respect of the manufacture of the WiWi product. The phrase 'regardless of with or without PO by us' meant regardless of whether any orders are made. This statement follows from the reference to 'PO' in SP2's preceding email. What the appellant wanted was to be able to assess their financial exposure.

[35] As SD2 testified in his witness statement in answer to question 9:

> I believe BCM is misinterpreting my email of 9.3.2012 to Mr. KC Sum, Pn. Noorliza and Pn. Azlina which can be seen in the CBD ..., particularly with respect to item 1 where I stated: Regardless of with or without PO by us, please do your best by considering that BCM buys the materials. This statement was not an instruction to BCM to mass manufacture the WiWi with or without any purchase order issued to BCM by MIMOS. This statement was made as part of the discussion during the simulation exercise.
>
> My statement must be read in context of the entire item 1. As you can see from my email of 9.3.2012, I further stated in item 1 that 'A2 kicks off once PO for the first 300 units is available. We are interested to know the exposure.' 'A2' refers to the bottom of the chart which I sent BCM via my email of 8.3.2012 which is found at ... attaching the chart at page 17. Referring to the chart, A1-A6 refers to the amount of money that is needed to purchase raw materials to build 300 units of WiWi each month starting for 'Month 6' to 'Month 11' referred to in the chart. What I meant in item 1 of my email of 9.3.2012 is that MIMOS wanted to know what the costs would be to purchase or replenish raw materials in A2 to build 300 units of WiWi for Month 7 in the chart at CBD ... and in calculating that amount for A2, BCM does not need to consider whether any purchase order was issued either for WiWi or for raw materials.

[36] Under cross-examination SP1 (Kok Choi Sum), the business unit director of the respondent, agreed that SP2 was conducting what was referred to as a simulation.

> SDB OK. Do you agree that Liza is preparing a ... a forecast based on ... based on a proposal to produce 300 units in one month, 300 units in the next month and 400 units in the following month? Based on the title, 300, 300, 400 pieces material. Do you agree?
>
> KOK Yes. This is a simulation.

[37] On Monday, 12 March 2012, SP2 emails to SD2 the proposal by way of an attachment referred to as 'Mimos WiWi 1.8b *Buffer Strategy*.ppt' (Emphasis added).

[38] On Tuesday, 13 March 2012 at 4:29pm, SP1 sends to SD3 (Razman bin Jaafar), senior manager in the commercialisation department of the appellant, and SD2, an email stating:

> Razman/Jauhari,
>
> Datuk called my CEO complaining on BCM delivery, saying that we need to prepare for the ramp up qty due to election etcc ...
>
> *Can u share with me the potential model/qty/timing for all the TR that we have*?
>
> *Understand that there is also a East Msia TR ... Beside QIC, (undecipherable), Comnitel, Isolectra ... etc..*
>
> *TR: XXXX*
>
> *WiWi Model: XXXXX*
>
> *expected delivery date: XXX*
>
> *Qty : XXX*
>
> My CEO has spoken to Datuk that *we will work out some proposal on buffer* and seek Datuk help ...
>
> *Pls provide me the requested data* ... and let us have a conf call, so that I can propose to my CEO ... and feedback to Datuk ...
>
> Thanks and best regards
>
> KC Sum
>
> BCM Electronics Corporation Sdn Bhd
>
> (Emphasis added.)

This was a request for data namely the potential model, the quantity and timing for all the Technology Recipients, ie MTRs. This can be seen from the list of data sought on the 'TR', the WiWi Model, the expected date of delivery and the quantity.

[39] At 17:00 (5pm) on the same day, 13 March 2012, SP1 sends an email stating:

> Razman,
>
> Loop into your gmail ... *pls include forecast of all the TR*...
>
> Thanks and best regards
>
> KC Sum
>
> BCM Electronics Corporation Sdn Bhd'
>
> (Emphasis added)

[40] At 5.12pm, 13 March 2012, SD3 then replies SP1's email. This was the email that the learned trial judge referred to as the '2nd impugned email'. This was also the email that the respondent pleaded in para 7 of its statement of claim as instructions by the appellant '... to proceed with the manufacturing

activities of the said products...'. In this email SP3 stated as follows:

> Subject: *WiWi Order Forecast*
>
> KC,
>
> *Below is the order/built forecast based on respective TR need for their potential deployment*. This is *inclusive also MIMOS potential order* in coming weeks.
>
> (Emphasis added.)

Below this message was a table headed:

> 'WiWi TR
>
> *Forecast*'

The table sets out the forecasted orders from MTRs and the appellant over several months totaling 2,822 units of the WiWi product. 72 units were to be from the appellant and the rest from MTRs.

[41] This email is reproduced below:

From: Razman Jaafar [mailto:razman.jaafar@mimos.my]
Sent: Tuesday, March 13, 2012 5:12 PM
To: KC Sim-BCM5862
Cc: Jauhari Abdul Ghafar; Wan Saedah Shahrawi Mohd Saleh; Nooriza-BCM5681; Mesron Muhamad
Subject: WiWi Order Forecast

KC,

Below is the order/built forecast based on respective TR need for their potential deployment. This is inclusive also MIMOS potential order in coming weeks.

WIWI TR
Forecast

	BOM/PN Nos	Remarks	Total	Jan	Feb	Mar	Apr	May	Jun
WiWi AP	40A00006800	QIC	450				120	120	210
WiWi Relay	40A00005500	QIC	1600				400	400	800
WiWi Hybrid	WiWi AP 1800-11N-WMX	PERNEC	300					150	150
WiWi AP	WiWi AP 1800-11N-AP	Venture Nucleus	200				100	100	
WiWi AP	WiWi AP 1800-11N-AP	Comintel	200				100	100	
WiWi Relay	WiWi AP 1800-11N-RLY	MIMOS Dev.	30				30		
WiWi Hybrid	WiWi AP 1800-11N-WMX	MIMOS Dev.	30				30		
WiWi AP	WiWi AP 1800-11N-AP	MIMOS PoC	12				12		

[42] As is plainly obvious, this email was a forecast of potential orders by both MTRs and the appellant. This was a forecast sought by SP1. That this was not instruction 'to proceed with manufacturing activities of the said products'

is plain and obvious in both the specific words used and the circumstances and context within which this email from SD3 was sent. Indeed, the forecast was not even of orders from the appellant alone, but also from MTRs.

[43] In fact, in the witness statement of SP1, the question posed and his answer were as follows:

> Q31: What was the further action taken by the plaintiff upon receiving the instructions from the defendant vide email dated 13.3.2012?
>
> A31: I had then forwarded the *forecast given by Razman* to my superior Mr CY Lee *to notify him that we will commence material purchase basing on the forecast given by the defendant*.
>
> (Emphasis added.)

This was set out in SP1's witness statement. It seems quite clear that a decision had been arrived at by SP1 to commence 'material purchase' based on the forecast of orders given by SD3. Having so decided, SP1 was merely going to notify his superior about it. This decision to 'commence material purchase' must surely be taken as a business decision made by SP1 — based merely on a forecast.

[44] On 22 March 2012, at 4.47pm, SP1 emails SD2 and SD3 stating as follows:

> Subject: Re: *WiWi Order Forecast*
>
> Dear all,
>
> We are *loading these fcst orders (2.8k)* into the MRP this week, after clearing all the PCNs ... total 2.8K ...
>
> 1 To release order to suppliers base on the lead time ... Especially long lead time parts ...
>
> 2 To pull in/build 1000 pcs asap, the date of build will be determined after accessing the reply from the suppliers.
>
> 3 *We appreciate MIMOS to agree/undertake this fcst in case of order not coming through* ...
>
> Thanks and best regards KC Sum
>
> BCM Electronics Corporation Sdn Bhd
>
> (Emphasis added.)

Here, in this email, the statement 'in case of order not coming through' clearly indicates that SP1 was cognisant of the possibility that orders may not occur.

[45] The placing of the orders was a decision made by the respondent in the face of the forecast given. Unless the term forecast was misunderstood for being an order placed, this would have been a decision made with full knowledge that

A the orders may not be placed or fully placed, either by the MTRs and/or the appellant. If it was an order placed based on a misunderstanding of the word 'forecast', despite the circumstances in which the preceding emails were sent, such cannot be turned into a responsibility and liability to be placed upon the appellants.

B

[46] In this regard, it was the respondent's position at the trial that it could proceed to purchase raw materials regardless of any orders from the appellant. Indeed, that may be so, but that does not render the appellant liable if the respondent chooses to place orders for raw materials without any order for the C WiWi product being actually placed by the appellant or any MTR. In fact, cl 7.1 of the NPIA states as follows:

> 7.1 BCM shall not manufacture a Product based on the MIMOS Technology unless expressly authorised to do so in writing by MIMOS.

D Therefore, to choose to order raw materials for a particular product without any express authority from the appellant to manufacture it, must necessarily be a business decision and risk that the respondent has to assume.

[47] SP1 was cross-examined on his understanding of a 'forecast'. The E cross-examination and his answers were as follows:

> SDB: OK. It is not a Purchase Order. Is there a difference between an order and a forecast?
>
> KOK: Yes, there is.
>
> F SBD: What is a forecast?
>
> KOK: A forecast is coming, and so you got to prepare the material, and give you a —
>
> SBD: would you agree with me that a forecast is a prediction?
>
> KOK: Depends how ... how the email write.
>
> G SBD: Would you ... would you agree or not?
>
> KOK: Certain extent, yes.
>
> SDB: In other words, there's no certainty in a forecast. Do you agree or —
>
> KOK: It it's no —
>
> H SDB: could you just answer? My question is, do you agree or disagree?
>
> KOK: Not 100% of certainty

SP1 in his witness statement states that he holds a Bachelor (BSc) in Computer Science from Universiti Sains Malaysia and an MBA from the University of I Strathclyde, Glasgow, Scotland, and he has had some 30 years of working experience.

[48] SD3's forecast of 13 March 2012 was in respect of both, orders by MTRs and by the appellant. In the table provided, the forecast of the total units

of the WiWi product that the appellant would require was only 72. The rest of the forecasted total units of 2,822 of the WiWi product ie the balance 2,750 units, were for MTRs, not the appellant. This was accepted by SP1 under cross-examination. The relevant part of the cross-examination is set out below:

> SDB: I'm going to go back. I think they going to ... I just have a few more questions. Let's go back to Razman's email of 13th March, since this appears to be the key to BCM's action. And that is at B1, page 29A and 29B. This email was sent on 13th of March by Razman. Is that correct?
>
> KOK: Correct.
>
> SDB: You have already confirmed that many of these orders are not supposed to come from MIMOS, they are supposed to come from Technology Recipients. Is that correct?
>
> KOK: No, there are also MIMOS there.
>
> SDB: *I said 'many of,' not 'all.' So you agree that 72 orders are supposed to come from MIMOS, correct?*
>
> KOK: *Yes, he indicate there.*
>
> SDB: *And the rest are supposed to come from Technology Recipients. Correct?*
>
> KOK: *Correct.*
>
> SDB: *You have also earlier in my examination agreed that Technology Recipient placed orders directly with PCM, correct?*
>
> KOK: *Correct.* (Emphasis added.)

[49] Under cross-examination, SP1 also accepted that orders from MTRs would be placed by MTRs. The relevant portion of SP1's cross-examination on this point disclosed as follows:

> SDB: You have also earlier in my examination agreed that Technology Recipient placed orders directly with BCM, correct?
>
> KOK: Correct.

[50] Therefore, the appellant's liability, if at all, should only be in respect of its forecasted orders of 72 units of the WiWi product and not for the total forecast of 2,822 units.

[51] It was common ground that there were no purchase orders issued by the appellant for 2,822 units of the WiWi product. There also does not appear to be any evidence of any proposal made by the respondent to the appellant for 2,822 units of the WiWi product in respect of which any purchase order may be placed.

The appellant's purchase of 1,000 units of PCBA

[52] The fact that the appellant had agreed to purchase 1,000 units of PCBA

from the respondent, namely components purchased by the respondent for the manufacture of 2,822 units of the WiWi product, played a critical part in the decision of the learned trial judge.

[53] SD1 (Datuk Abdul Wahab bin Abdullah), the President and Chief Executive Officer of the appellant at the material time, testified that he first became aware of the respondent's issue with the raw materials that it had purchased was when the respondent's Chief Executive Officer sought help from him. The relevant part of SD1's testimony in his witness statement states as follows:

> Q12: When did you first become aware that BCM was raising an issue concerning raw material held by it?
>
> A12: I became aware of this when I received a call from BCM's CEO Lee Chong Yeow ('Mr. Lee') in or around March 2013. *Mr. Lee informed me that there was a problem with raw material purchased by BCM to 'support' MIMOS and which was not being utilised. He asked if I could assist BCM with solving this problem. I informed him that I would look into the issue. At that time, no accusation was made that MIMOS had caused this problem. My impression was that BCM had optimistically purchased raw materials in anticipation of orders from Technology Recipients, but that risk had not paid off as the orders did not come in*. BCM was therefore left holding the raw materials.
>
> Q13: What did you do following this call?
>
> A13: *I instructed MIMOS personnel En. Wan Azli Wan Ismail* ('En. Wan Azli') (whose department was then dealing with BCM) *to proceed to do a stock take at BCM's premises to identify what raw materials were being held and the quantity of the same.*
>
> En. Wan Azli and his team proceeded to conduct a stock take of the raw materials at BCM's premises and it was determined that there were raw materials about RM3.2 million being held by BCM. The raw materials comprised of both generic and unique material.
>
> Following this stock take, *MIMOS conducted an internal assessment of whether or not there were raw materials which MIMOS itself could purchase and use for its own projects. Based on that, MIMOS agreed to purchase semi-assembled (kits) materials for the production of 1000 units of WiWi to help BCM*. (Emphasis added.)

[54] This testimony of SD1 is important as it traces the basis and reason for the appellant's purchase of the 1,000 units of PCBA. The testimony that it was the Chief Executive Officer of the respondent who approached SD1 for help; 'assistance to solve his problem', was not challenged in cross-examination. His cross-examination went as follows:

> JS: Now during the course of execution of the contract, ok, probably somewhere in 2012 right up to your payment end of November, end of 2013, you will agree you have communicated with the BCM's MD, Mr CY Lai, CY, CY Lee.
>
> WAHAB: CY Lai, CY Lee called me for help.

JS: Yes. You are —

WAHAB: Communicated through that.

JS: You have communicated several times with Mr CY Lee?

WAHAB: He initiated the call to me.

JS: Yes. And can you remember the first call was when?

WAHAB: The request came, I can recall, somewhere March. March.

JS: Somewhere in March?

WAHAB: March he calls me for help.

JS: There was also some email exchanges?

WAHAB: No email exchanges. I am not recall any.

JS: And there, sorry? You cannot recall?

WAHAB: I don't, there's an email.

[55] It was put to SD1 that the appellant's purchase of the 1,000 units of PCBA suggested that the appellant had agreed to take up 2,822 parts, and be responsible for the raw materials that were acquired by the respondent. This was denied by SD1. SD1 also denied that the appellant had purchased 1,000 units of the WiWi product out of the 2,822 units that were allegedly ordered. SD1 was at pains to explain that the 1,000 units were not 1,000 units out of the 2,822 units of the WiWi product allegedly ordered. The 1,000 units were component parts, ie units of PCBA, that were bought by the respondent for the production of 2,822 units of the WiWi product allegedly ordered. This distinction between the 2,822 units of the WiWi product and the component that would be used for their manufacture was important.

[56] The reasons for the purchase of the 1,000 units of PCBA were provided by SD1. The purchase was of PCBAs which are components that the appellant could use for the appellant's own projects. This purchase would, at the same time, assist the respondent who had found itself in a predicament. The purchase of the 1,000 PCBAs was therefore not merely to help the appellant purely out of goodwill at the expense of the appellant.

[57] Consistently, a procurement agreement and purchase orders were issued for the 1,000 units of PCBA. These were not settlement agreements in acknowledgement of a wrong committed. On this, the learned trial judge was right in stating that, 'the procurement agreement is what it is. It is not, with respect, a settlement agreement to discharge the parties, in particular the defendant of its respective obligations'.

[58] The appellant's purchase of the 1,000 units of PCBA should not attract any cynicism. It should not be inferred as an admission or indication of liability

merely because of a view held that a government linked company would not pay another company a substantial sum of money out of sheer goodwill. As pointed out, that was not the evidence led. It was not payment out of sheer goodwill.

[59] With respect, it was also plainly incorrect for the learned trial judge to take the view that, 'it (the respondent) cannot say that in the absence of any PO, there was the order was never confirmed but later on paid for a portion of the 'unconfirmed order'. It was on this basis that the learned trial judge agreed with the contention that the appellant had acted inconsistently, 'approbating and reprobating' at the same time. However, as pointed out, the purchase of the 1,000 units of PCBA was not a purchase of 1,000 units of the WiWi product. It was a purchase of 1,000 units of a component that the appellant could use for its own projects.

Appellate intervention

[60] The principles upon which appellate intervention is permitted are well settled. They were reiterated in an authoritative and lucid pronouncement by the Federal Court in a judgment by Zabariah Yusof FCJ, in setting aside a decision of this court for reversing findings of fact by a trial judge at first instance. That was the case of *Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67.

[61] In *Ng Hoo Kui*, after a careful analysis of authoritative decisions of courts within and without the country, Zabariah Yusof FCJ stated as follows:

> [62] The Malaysian position has always been that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong.
>
> ...
>
> [70] That appellate interference would only be justified in situations where the trial court has been 'plainly wrong' has been repeatedly affirmed in the latest decisions of this court: see *Director of Forest Sarawak&Ors vNicholasMujah ak Ason & Ors* [2020] 1 MLJ 612; [2020] 2 CLJ 1 at paras [73]–[74] and *Jeli Anak Naga & 4 Others v Tung Huat Pelita Niah Plantation & Ors and Another Appeal* [2019] MLJU 1311; [2020] 1 CLJ 449 at para [49].
>
> ...
>
> [76] What is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts.
>
> ...
>
> [78] Hence following this court's ruling in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra* an appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong'

where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[62] Thus, unless it can be demonstrated that a trial judge was plainly wrong due to a lack of judicial appreciation of the evidence led, there ought not to be any appellate interference with the trial judge's finding of primary facts.

[63] A decision or conclusion of a trial judge may be said to be 'plainly wrong' if it cannot reasonably be explained or justified and is a decision or conclusion that no reasonable judge could have reached.

[64] A trial judge cannot be said to be plainly wrong merely because upon the evidence disclosed, the appellate tribunal prefers a different conclusion from that of the trial judge.

[65] There is another observation that is of particular importance for the purposes of the instant case and that is the observation by Ward LJ in *Assicurazioni Generali SpA v Arab Insurance Group; Practice Note* [2003] 1 WLR 577 (CA), referred to in *Ng Hoo Kui*:

> If the challenge is to the finding of a primary fact, particularly if founded upon assessment of the credibility of witnesses, then it will be a hard task to overthrow. *Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts*. (Emphasis added.)

In making this observation, Ward LJ alluded to the judgment of the court in *The Glannibanta* (1876) LR 1 PD 283 at p 287 as being apposite on the point in which it was stated thus:

> Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to [*Bland v Ross, The Julia* (1860) 14 Moo PC 210, 15 ER 284 and *Reid (owner of the SS Alice) v Aberdeen, Newcastle and Hull Steam Co (owners of the Princess Alice), The Alice and The Princess Alice* (1969) LR 2 PC 245, *the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to a cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.*

[66] In its conclusion, the Federal Court in *Ng Hoo Kui*, with respect quite wisely, declined to set rigid parameters for the applicable test. At para 148, Zabariah Yusof FCJ stated thus:

> [148] Given the aforesaid, we form the view that *rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test as espoused in decisions of this court should be retained as a flexible guide for appellate courts. As long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed.* The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

[67] Reverting to the instant case, the primary issue was whether the appellant had instructed the respondent to manufacture 2,822 units of the WiWi product based on its email of 13 March 2012. That was the respondent's pleaded case and the existence of the email in question was not disputed. This issue turned predominantly, if not entirely, on an interpretation of contemporaneous emails rather than the oral testimony and veracity of the witnesses (*UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785, para [27]). The emails themselves were self-explanatory. The oral testimony adduced could very easily be tested against the expressed wordings of the emails, and the contexts and circumstances in which they were exchanged.

[68] Having regard to the express words used in the email of 13 March 2012 itself, it is our view that it was neither rational nor reasonable to conclude that they were tantamount to instructions to manufacture 2,822 units of the WiWi product. The subject of the email itself was headed 'WIWI Order Forecast'. The message in the email itself contained the words 'order/built forecast based on respective TR need for potential development.' The table upon which the number of units of the WiWi product was derived, ie 2,822, was entitled 'WIWI TR' and 'Forecast'. Consistent with it being a forecast, the dates in the table in respect of when orders were forecasted were future months.

[69] Having regard to the email trail and the context in which the email in question was sent, it is also clear that it was a forecast made at the request of SP1 in his email of the same date, 13 March 2012, but sent earlier at 5pm. The very words used were 'pls include forecast of all the TR'. Clearly, in order to properly appreciate the intent of the email in question, its context needs to be taken into account. In this case, the context can clearly be drawn from the emails preceding the email in question.

[70] The email trail also disclosed quite clearly that the context of the forecast was to enable the respondent to project the lead time that would be required for the manufacture of the WiWi product. This was tied up with the proposal that the respondent had made to the appellant in its email of 1 March 2012 at 3:11pm by SP2, and which proposal contained the option whether the respondent was to purchase the raw materials for the manufacture of the WiWi product or whether it was to be on a consignment basis by the appellant. This option was described as its 'material buffer strategy'.

[71] The conclusion whether the email of 13 March 2012 was tantamount to instructions to proceed to manufacture 2,822 units of the WiWi product does not, in our view, turn on an assessment of the credibility of the witnesses. In fact, based on the learned trial judge's judgment, there was no indication that the learned judge's conclusion was premised on any such assessment. If anything, it was the credibility of SP1's testimony as to whether he had misunderstood the email and what was meant by a forecast that is suspect. The email however, speaks for itself.

[72] In light of the explanation given by SD1 for the purchase of the 1,000 units of PCBA and the fact that specific purchase orders were issued and the PCBA purchased were components that the appellant could use, it was not reasonable to conclude that the purchase was somehow incompatible with a bona fide transaction to secure usable components for the appellant and at the same time to provide some assistance to the respondent in the predicament that it had found itself. It was incorrect for the learned trial judge to conclude that these purchases were payment, 'for a portion of the 'unconfirmed order'. They were purchases and payment for component parts that the appellant could use which explanation, in any event, was not challenged in cross-examination.

[73] This is also not to overlook the fact that of the 2,822 units of the WiWi product forecasted, only 72 units were forecasted to be purchased by the appellant. The rest were units for MTRs. There is nothing to suggest that the appellant would be purchasing the balance of the 2,822 units on behalf of the MTRs. There was nothing to this effect in the emails in question or evidence led.

CONCLUSION

[74] In the premises, we are respectfully of the view that the learned trial judge was plainly wrong in his finding that the appellant had instructed the manufacture of 2,822 units of the WiWi product and in concluding that the appellant was liable for the respondent's claim of the sum of RM1,672,789. With respect, there was in our view a lack of judicial appreciation of the

A evidence led at the trial. Accordingly, the appellant's appeal was allowed with costs. The decision of the High Court was set aside.

Appeal allowed with costs.

B Reported by Ahmad Ismail Illman Mohd Razali

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